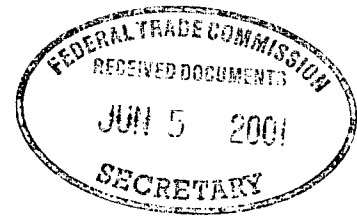


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of)
)
)

Schering-Plough Corporation,)
a corporation,)
)

Upsher-Smith Laboratories, Inc.,)
a corporation,)
)

and)
)
)

American Home Products Corporation,)
a corporation.)
_____)

Docket No. 9297

**UPSHER-SMITH'S OPPOSITION TO
KV PHARMACEUTICAL'S MOTION TO AMEND THE PROTECTIVE ORDER**

KV Pharmaceutical's motion — like Complaint Counsel's earlier motion — is based on a misunderstanding of Mr. Robbins's responsibilities. KV Pharmaceutical speculates, based solely on Mr. Robbins's title, that he has responsibilities for competitive decisionmaking. In fact, Mr. Robbins does *not* have any such responsibilities.

Mr. Robbins's May 29, 2001 declaration, filed in response to Complaint Counsel's motion, establishes that Mr. Robbins does *not* have "any responsibility whatsoever for designing new products, developing marketing strategy, analyzing competitive conditions, establishing launch dates, setting prices, or other activities that could fairly be characterized as 'competitive decisionmaking.'" Robbins Decl. ¶ 20. Instead, the declaration establishes that Mr. Robbins has responsibility for providing legal advice to Upsher-Smith in certain highly regulated areas and for coordinating with outside counsel. Robbins Decl. ¶¶ 3-14.

KV Pharmaceutical evidently is concerned because *its* Vice President of Scientific Affairs, Elio Mariani, has responsibilities for competitive decisionmaking. Mariani Decl. ¶ 5. KV Pharmaceutical and Mr. Mariani speculate that a Vice President of Scientific Affairs at any pharmaceutical company could “generally” be expected to have responsibilities “similar to” Mr. Mariani’s. Mo. at 3; Mariani Decl. ¶ 6. However accurate this speculation may be as a general matter, here the undisputed record establishes that Mark Robbins, Upsher-Smith’s Vice President of Scientific Affairs, does not have any responsibility for “competitive decisionmaking.”

KV Pharmaceutical relies upon *Sullivan Marketing, Inc. v. Valassis Comm., Inc.*, 1994 WL 177795 (S.D.N.Y. 1994), but that case merely confirms *U.S. Steel*’s holding that a court must consider the actual responsibilities of an in-house attorney in deciding whether the attorney should have access to confidential materials of a competitor. Here the actual responsibilities of Mr. Robbins demonstrably exclude “competitive decisionmaking,” and he therefore should have access to such materials on the same basis as the in-house attorneys designated by Schering and AHP.

CONCLUSION

KV Pharmaceutical's motion to amend the Protective Order should be denied. Upsher-Smith's defense team should be permitted to benefit from Mr. Robbins's review and analysis of Confidential Materials, just as Schering's and AHP's defense teams may benefit from the review and analysis of such materials by their designated in-house attorneys. KV Pharmaceutical and other third parties can rest assured that their Confidential Materials will not be misused, as Mr. Robbins does not have responsibility for "competitive decisionmaking" and he will execute and honor the required declaration to maintain the confidentiality of those materials.

Dated: June 5, 2001

Respectfully submitted,


WHITE & CASE LLP

By: _____

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Attorneys for Upsher-Smith Laboratories, Inc.

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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ORDER

Upon consideration of KV Pharmaceutical's Motion to Amend The Protective Order, Upsher-Smith's opposition thereto, and the record as a whole, it is hereby **ORDERED** that the Motion is **DENIED**.

Date: _____

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June 2001 I caused copies of the foregoing Upsher-Smith's Opposition To KV Pharmaceutical's Motion To Amend The Protective Order to be served upon the following by hand delivery:

The Honorable D. Michael Chappell
Administrative Law Judge
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Sanjiv S. Kala